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No. 84-593

In the Supreme Court of the United States

OCTOBER TERM, 1984

TRAVIS N. BEESON, PETITIONER

v.

HENRY E. HUDSON, ETC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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Petitioner, a former probationary federal employee, contends that the court of appeals erred in affirming the dismissal of this *Bivens* action against his former superiors on the ground that he had voluntarily resigned.

1. a. Petitioner held a probationary position as staff assistant to the director of the Veterans Administration Regional Office in Little Rock, Arkansas, from August 4, 1969 until January 30, 1970 (Pet. App. A20-A21, A24). During the time relevant to this lawsuit, respondent Henry E. Hudson was Director of the Little Rock Regional Office and petitioner's immediate superior; respondent Rufus Wilson was Chief of the Department of Veterans Benefits in Washington, D.C.; and respondents Donald Johnson and Fred B. Rhodes were Administrator and Deputy Administrator, respectively, of the VA in Washington (*id.* at A8, A20, A23).

In early 1970, Wilson received a series of reports prepared by the Federal Bureau of Investigation in the normal course of its investigation of petitioner in connection with his government employment. The reports included allegations that petitioner had fraudulently obtained and misused federal home improvement loans through the fall of 1969 and that he was involved in a check-kiting scheme in 1967 and 1968. They also noted that petitioner would likely be indicted. Pet. App. A29-A34. Based on the information contained in these reports, including petitioner's own statements, respondents Wilson, Johnson and Rhodes determined that petitioner's appointment should be terminated, but that he should be offered the opportunity to resign first (*id.* at A34-A35).

That decision was communicated to petitioner by respondent Hudson on January 29, 1970. Petitioner initially refused to resign. Following consultation with his wife and with an acquaintance on the White House staff who confirmed the likelihood of indictment and advised him to resign, however, petitioner submitted his resignation on January 30, 1970. Pet. App. A35-A39. Petitioner did not seek to withdraw his resignation or to challenge it through administrative proceedings (*id.* at A39).

b. Petitioner did not allege that his resignation was involuntary until 1976, when he filed this action in the United States District Court for the Western District of Arkansas, seeking damages against respondents in their personal capacities for allegedly violating his rights under the Fifth Amendment by constructively discharging him from his position. See *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971). The district court initially dismissed the complaint on the ground that petitioner, as a probationary employee, had no constitutionally cognizable property interest in his continued employment (Pet. App. A9-A10). The court of appeals vacated and remanded, directing the

district court not to reach the constitutional question unless it first determined that petitioner's resignation was involuntary and that respondents had blocked his access to administrative relief (630 F.2d 622, 627 (8th Cir. 1980)). On remand, the district court, following a bench trial, again dismissed the complaint, holding that petitioner's allegations that he resigned involuntarily "fail as a matter of law" because there was no evidence of duress or deception on the part of respondents (Pet. App. A41-A46). The court further determined that respondents did not deprive petitioner of access to administrative remedies (*id.* at A54). The court of appeals affirmed in an unpublished per curiam decision (*id.* at A1-A5) on the basis of the district court's opinion, noting that there was no error in failing to hold a jury trial because the issues were decided as a matter of law (*id.* at A4).

2. The decision below is correct and does not conflict with any decision of this Court of any other court of appeals. Petitioner's factbound claim that he was coerced into resigning, rejected by both courts below, does not merit further review.

Petitioner's contention (Pet. 14-16) that he was improperly denied a jury trial is meritless. The district court determined the issue as a matter of law because petitioner failed to present any objective evidence of duress to overcome the presumption that his resignation was voluntary (Pet. App. A40-A46). See, *e.g.*, *Christie* v. *United States*, 518 F.2d 584 (Ct. Cl. 1975). As the district court concluded (Pet. App. A45), "There is nothing in this record * * * to suggest that [petitioner's] resignation was obtained as a result of deception or misrepresentation on the part of the [respondents]." Petitioner was aware of his legal difficulties even before he obtained his federal position, he took the time to consult with others when offered the opportunity to resign, and he then submitted a resignation whose voluntariness he did not

contest for six years. Petitioner himself does not identify anything in the record that might give rise to a disputed issue of fact with respect to whether he resigned voluntarily.[1]

Petitioner's contentions (Pet. 16-24) that respondents violated regulations addressing the procedures to be followed in terminating probationary employees misses the point that petitioner was not terminated, but voluntarily resigned. He points to nothing in the regulations that prohibits supervisors from first offering employees the opportunity to resign rather than face lengthy and possibly embarrassing formal termination proceedings. And certainly nothing in the Constitution stands in the way of such a sensible course, saving the employee the disgrace of being terminated under the cloud of possible criminal prosecution and the government the expense and delay of proceedings that the employee himself would rather forgo.[2]

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[1]Petitioner's contention (Pet. 29-35) that the FBI investigative reports were hearsay and improperly relied upon by the district court is incorrect. The reports were not relied on for their truth, but only to show the basis for respondents' decision to offer petitioner the opportunity to resign before formal removal proceedings were instituted. Petitioner does not contend that the charges against him were raised in bad faith for the purpose of coercing his resignation.

[2]Petitioner's arguments (Pet. 24-29) concerning whether a probationary employee possesses a property right in his continued employment and whether respondents are entitled to immunity on these facts were not addressed by the court below, and are simply not presented in view of petitioner's voluntary relinquishment of his employment. Even if petitioner's resignation were not voluntary, the comprehensive remedial scheme enacted by Congress with respect to federal employees would preclude his *Bivens* claim. See *Bush* v. *Lucas*, 462 U.S. 367 (1983); *Pinar* v. *Dole*, No. 83-2006 (4th Cir. Oct. 22, 1984).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

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